Kunn Rekon Holdings Sdn Bhd v Public Prosecutor and other applications

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NOS 44–35–95, 44–3–1996 AND MISCELLANEOUS CRIMINAL APPLICATION NO 44–1–1996
LOW HOP BING J
16 FEBRUARY 1996

Criminal Procedure *— Court — Criminal court — Use of an affidavit sworn before a Commissioner for Oaths — Whether s 424(1)(a) of the Criminal Procedure Code excludes use of an affidavit in a criminal court if such affidavit is sworn before a Commissioner for Oaths — Criminal Procedure Code (FMS Cap 6) s 424(1)(a)*

In these three separate criminal applications for various orders, the respective affidavits of the applicants were affirmed before the Commissioner for Oaths. The learned deputy public prosecutor raised a preliminary objection on the ground that the respective affidavits were not affirmed before a magistrate or registrar as required by s 424 (1)(a) of the Criminal Procedure Code ('CPC'). This, according to the deputy public prosecutor, meant that the affidavits could not be used in a criminal court. The question of law for determination by the court therefore was whether the provision of s 424 (1)(a) of the CPC prohibits or excludes the use of an affidavit in a criminal court if such an affidavit is sworn in the Federation before a Commissioner for Oaths and not before a magistrate or registrar.

Held, dismissing the preliminary objection:

(1) Section 424 (1)(a) of the CPC is an enabling provision and is not intended to be an overriding, overpowering or dominant provision; rather it's specifically enacted to make it 'subject to any rules of court (see p 264D–E).

(2) The inclusion of the phrase 'subject to any rules of court' in s 424 (1)(a) of the CPC means that the application, operation, effect or implication of that section is specifically bound by or made subservient to any rules of court so that when any rules of court are invoked in a particular instance, they will take precedence (see p 264E–F).

(3) Order 41 of the Rules of the High Court 1980 ('RHC 1980') is operative and applies equally to both civil and criminal proceedings and s 424 of the CPC is subject to O 41 of the RHC 1980. That being the case, the result is that an affidavit signd by a Commissioner for Oaths may be used in a criminal court in addition to and not in derogation from the provision of s 424 (1)(a) of the CPC (see p 266A–B).

(4) Section 424 (1)(a) pf the CPC should be read together with O 41 of the RHC, ss 3 and 11 of the Courts of Judicature Act 1964 ('CJA 1964') and r 12 of the Commissioner for Oaths Rules

1993 ('the 1993 rules') and be given a liberal interpretation since there is no prohibition or restriction excluding an affidavit sworn in the Federation before a Commissioner for Oaths (see p 267E–F). A

[Bahasa Malaysia summary B

Dalam ketiga-tiga permohonan jenayah ini untuk berbagai perintah, afidavit masing-masing pemohon telah disahkan di hadapan Pesuruhjaya Sumpah. Penolong pendakwaraya yang bijaksana telah menimbulkan bantahan awal atas dasar bahawa afidavit masing-masing tersebut telah tidak disahkan di hadapan majistret ataupun pendaftar seperti yang dikehendaki oleh s 424 (1)(a) Kanun Acara Jenayah ('KAJ'). Ini, menurut penolong pendakwaraya, bermaksud bahawa afidavit-afidavit tersebut tidak boleh digunakan di mahkamah jenayah. Persoalan undang-undang untuk diputuskan oleh mahkamah adalah samada peruntukan s 424 (1)(a) KAJ melarang ataupun menghalang penggunaan afidavit di mahkamah jenayah jikalau afidavit tersebut telah disumpahkan dalam Persekutuan di hadapan Pesuruhjaya Sumpah and bukan di hadapan majistret ataupun pendaftar. C D

Diputuskan, menolak permohonan atas bantahan awal: E

(1) Seksyen 424 (1)(a) KAJ merupakan peruntukan pembolehan and bukannya bermaksud suatu peruntukan yang mengatasi, menguasai ataupun dominan; sebaliknya ianya digubal khas untuk dijadikan 'tertakluk kepada kaedah-kaedah mahkamah' (lihat ms 264D–E).

(2) Kemasukkan frasa 'tertakluk kepada kaedah-kaedah mahkamah' dalam s 424 (1)(a) KAJ bermaksud bahawa pemakaian, operasi, kesan dan implikasi seksyen tersebut adalah tertakluk ataupun dijadikan lebih rendah kepada kaedah-kaedah mahkamah supaya apabila mana-mana kaedah mahkamah tersebut digunakan dalam mana-mana keadaan, ianya akan mendahului (lihat ms 264E–F). F G

(3) Aturan 41 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') adalah beroperasi dan terpakai sama-sama di kedua-dua prosiding sivil dan jenayah dan s 424 KAJ adalah tertakluk kepada A 41 KMT. Maka, kesannya adalah bahawa afidavit yang ditandatangani oleh Pesuruhjaya Sumpah boleh digunakan di mahkamah jenayah sebagai tambahan kepada dan bukan pengurangan daripada peruntukan s 424 (1)(a) KAJ (lihat ms 266A–B). H

(4) Seksyen 424 (1)(a) KAJ patut dibaca bersama dengan A 41 KMT, ss 3 dan 11 Akta Mahkamah Kehakiman 1964 ('AMK') dan k 12 Kaedah-kaedah Pesuruhjaya Sumpah 1993 dan patut diberi intepretasi liberal oleh kerana tidak ada larangan ataupun I

A sekatan yang menghalang afidavit yang disumpah di Persekutuan di hadapan Pesuruhjaya Sumpah (lihat ms 267E–F).]

Cases referred to

Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada B *Pengkalan TLDM Lumut* [1996] 4 MLJ 190
Benge & Pratt v Guardian Assurance Co (1915) 34 NZLR 81
DP Vijandran v Majlis Peguam [1995] 2 MLJ 391
Dato Mohamed Hashim Shamsuddin v Attorney General, Hong Kong [1986] 2 MLJ 112
C *Gapari bin Kitingan v Attorney General, Malaysia* [1991] 1 MLJ 159
Ng Hong Choon v Timbalan Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285

Legislation referred to

Commissioner for Oaths Rules 1993 r 12
D Courts of Judicature Act 1964 ss 3, 11
Criminal Procedure Code (FMS Cap 6) s 424 (1)(a)
Rules of the High Court 1980 O 1 r (2), O 39, O 41, O 66

M Menon (Jaffar & Menon) for the applicant.
E *Baizura Haji Kamal* (Deputy Public Prosecutor) for the Public Prosecutor in Criminal Application No 44–35–95.
Devadason (Devadason & Devadason) for the applicant.
Norjehan (Deputy Public Prosecutor) for the Public Prosecutor in Criminal Application No 44–1–96.
Ng Aik Guan (Ching, Tan & Associates) for the applicant.
F *Wan Ahmad Kamal* (Deputy Public Prosecutor) for the Public Prosecutor in Criminal Application No 44–3–96.

Cur Adv Vult

G **Low Hop Bing J:** In these three separate criminal applications for various orders, the learned deputy public prosecutor has raised a novel but fundamentally important question of law which has widespread and far-reaching implications in the administration of criminal justice in our country. As the question of law raised in these applications is identical, I have set out all the grounds and conclusions which shall apply to and bind H all the parties herein.

The respective affidavits in support of these applications have been affirmed before a Commissioner for Oaths. The learned deputy has raised a preliminary objection on the ground that the respective affidavits have not been affirmed before a magistrate or registrar and that being the case, I the applicants have failed to comply with the provisions of s 424(1)(a) of the Criminal Procedure Code (FMS Cap 6) ('the CPC'), with the result that the affidavits cannot be used in a criminal court.

The question of law for determination by the court may be formulated as follows:

Whether the provisions of s 424(1)(a) of the CPC prohibit or exclude the use of an affidavit in a criminal court if such an affidavit is sworn in the Federation before a Commissioner for Oaths and not before a magistrate or registrar?

It is the contention of the learned deputy that s 424(1)(a) would only admit an affidavit which is sworn in the Federation before any magistrate or registrar, as a result of which an affidavit which is sworn, as in the instant case, before a Commissioner for Oaths in the Federation, cannot be used in a criminal court.

It is the unanimous view of all learned counsel for the respective applicants herein that under the provisions of s 424(1)(a), in addition to the use, in a criminal court, of an affidavit sworn in the Federation before any magistrate or registrar, an affidavit which is sworn in the Federation before a Commissioner for Oaths may be used in a criminal court because s 424(1)(a) does not prohibit or exclude the use of such an affidavit.

Section 424(1)(a) reads as follows:

(1) *Subject to any rules of court*, any affidavit may be used in a criminal court if it is sworn—

(a) in the Federation before any magistrate or registrar. (Emphasis mine.)

In my view, s 424(1)(a) is an enabling provision under which an affidavit which is sworn in the Federation before any magistrate or registrar may be used in a criminal court. It is not intended to be an overriding, overpowering or a dominant provision, but it is specifically enacted to be 'subject to any rules of court'. The inclusion of the phrase 'subject to' in s 424 means that s 424 is not to be construed as an independent provision. Section 424 is not intended to stand on its own. The scope, application, operation, effect or implication of s 424(1)(a) is specifically bound by or made subservient to any rules of court so that when any rules of court are invoked in a particular instance, the rules of court will take precedence and become the dominant provision to prevail upon the provisions of s 424(1)(a), in which event s 424 will then play a secondary role or take a back seat, so to speak: see *DP Vijandran v Majlis Peguam* [1995] 2 MLJ 391. Although my decision in *Vijandran's* case has been set aside by the Court of Appeal, the statutory interpretation in relation to the phrase 'subject to' and its legal connotations apparently remain intact.

Stout CJ in the New Zealand case of *Benge & Pratt v Guardian Assurance Co* (1915) 34 NZLR 81 at p 86 held that the phrase 'subject to' mean 'swallowed up' or 'negatived by'. Hence, in its application to s 424(1(a), the provisions therein are effectively negatived by 'any rules of court'.

The learned deputy further contends that pursuant to O 1 r 2(2) of the Rules of High Court 1980 ('the RHC 1980'), the provisions of the RHC 1980 are expressly stated to be inoperative in relation to criminal proceedings.

All learned counsel for the respective applicants on the other hand submit that the RHC 1980 are applicable and have full force in relation to affidavits which are to be used in a criminal court.

A In my considered opinion, O 1 r 2(2) of the RHC 1980 is not intended to wholly or completely exclude its application to criminal proceedings. In *Dato Mohamed Hashim Shamsuddin v A-G of Hong Kong* [1986] 2 MLJ 112, the then Chief Justice Malaya, made an ex parte order allowing for the taking of evidence before the High Court upon a letter of B request issued by the Hong Kong High Court. The evidence was to be used in a criminal proceeding pending in Hong Kong. An application was made to set aside the order and this was dismissed in the High Court. The appellant appealed. It was submitted that the impugned order was bad and must be set aside as, inter alia, O 66 r 1 of the RHC 1980, under which it was made, does not apply in relation to criminal proceedings.

C The majority of the Supreme Court held, inter alia, that the statutory source and enabling provision for O 66 of the RHC 1980 is s 16(1) of the Courts of Judicature Act 1964 ('the CJA 1964'). Order 66 is properly enacted in relation to both *civil and criminal proceedings* and therefore the order made in this case is *intra vires*.

D In *Gapari Bin Kitingan v Attorney General Malaysia* [1991] 1 MLJ 159 SC, there was an appeal from the decision of the High Court dismissing the appellant's application to set aside the ex parte order granting the application by the Attorney General of Malaysia for depositions of certain persons named in the application to be obtained in Hong Kong and further order for the issue of a letter of request to be directed to the E Supreme Court of Hong Kong to request that court to take or cause to be taken the depositions of the said persons for the purpose of criminal proceedings in Malaysia. The Supreme Court in dismissing the appeal from the High Court held, inter alia, that O 39, which provides for the power to order depositions to be taken, *should be applicable not only in* F *respect of civil but also to criminal proceedings*.

In *Ng Hong Choon v Timbalan Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285 the Supreme Court held, inter alia, that in matters relating to the format and the procedural rules as to the use of affidavits, O 54 (relating to habeas corpus proceedings, which rule has now been G revoked) and other related provisions may be resorted to, but the proceedings must be conducted with the strictness of a criminal trial. The Supreme Court has clearly supported the proposition that the above provisions of the Rules of High Court are operative and *applicable equally in both civil and criminal proceedings*. In the same case in the High Court [1994] 1 MLJ 592, 597, Vincent Ng J concluded that in habeas corpus H proceedings (being quasi-criminal), s 424(i) read together with s 365 and 366 of the CPC clearly ordains the application of certain provisions of the RHC 1980 to habeas corpus proceedings.

These decisions of the Supreme Court and the High Court have established one common denominator in that notwithstanding the provisions I of O 1 r 2(2) of the RHC 1980, it is demonstrably clear that O 66 (obtaining of evidence for foreign courts); O 39 (evidence by deposition: examiners of the court); O 54 (now revoked, but when in force, it governed habeas corpus proceedings), of the RHC 1980 are operative and apply

equally to both civil and criminal proceedings. In this context, I am of the considered view that the provisions of O 41 regulating the use of affidavits are operative and apply equally to both civil and criminal proceedings and s 424 is expressly enacted to be subject to any rules of court, eg O 41. That being the case, the result is that an affidavit signed by a Commissioner for Oaths may be used in a criminal court in addition to and not in derogation from the provisions of s 424(1)(a). Under O 41 r 1(8) read with Form 78 of that rule, an affidavit may be sworn before a Commissioner for Oaths. Further, s 11(1) of the CJA 1964 states that any registrar and any person appointed by the Chief Justice to be a Commissioner for Oaths may do all or any of the following things eg:

(a) Section 11(1)(c)(ii) 'administer oaths for taking any affidavit or affirmation.'

(b) Section 11(1)(c)(vi) 'administer oaths for swearing persons in any *action*, matter or *proceeding*, which is pending or about to be instituted in any court in any of its jurisdictions.' (Emphasis mine.)

The use of words 'any ... proceeding' is significant. 'Proceeding' is defined in s 3 of the CJA 1964 as any proceeding whatsoever of a *civil or criminal nature*.

Hence, it is clear that any person who is appointed a Commissioner for Oaths may administer oaths for taking any affidavit and such affidavit may be used for the purposes of any proceeding whatsoever of a civil or criminal nature.

Rule 12 of the Commissioner for Oaths Rules 1993 ('the 1993 rules') provides that a public officer or any other person appointed as a Commissioner for Oaths may do all or any of the following, eg:

(a) administer oaths for—

(i) ...

(ii) taking any affidavit or affirmation;

(iii)

(iv) swearing persons in *any* action, matter or *proceeding* which is pending or about to be instituted in any court.' (Emphasis mine.)

This is a restatement of the provisions of s 11(1)(c)(ii) and (iv) of the CJA 1964 and is a strong reaffirmation of the proposition that an affidavit sworn before a Commissioner for Oaths may be used. It is eminently clear to me that a Commissioner for Oaths is authorized by law to affirm an affidavit of a deponent for the purpose of using the said affidavit in a criminal court as it is expressly provided for in s 3 and s 11 of the CJA 1964 and r 12 of the 1993 rules.

The approach suggested by the learned deputy is too narrow and too restrictive and is not in consonance with the provisions of s 424(1)(a) of the CPC, which does not contain any prohibition or restriction, either expressly or by necessary implication.

From the practical point of view, it is common knowledge that magistrates and registrars are already inundated with both judicial and

A administrative duties within the respective local limits of their jurisdiction. It is practically impossible or inconceivable for s 424 to require each and every affidavit to be affirmed by a magistrate or registrar (and to exclude an affidavit sworn before a Commissioner for Oaths) before it can be used in a criminal court. If that be the case that whenever an application is to be made to a criminal court it would be necessary to take either a magistrate or registrar to a prison where the applicant is detained or to bring the applicant (who is not detained or imprisoned) to the chambers of the magistrate or registrar which will inevitably and unduly interrupt the normal course of duties of a magistrate or registrar. Visiting hours of the prison are rather constrained. It will be time consuming and human resource draining. It is indeed difficult if not possible to find a time which is mutually convenient to a magistrate or registrar and to bring one of them to a prison at a time which is convenient to all parties concerned. This is certainly not the intention of the law under s 424(1)(a). If it is the intention of Parliament to limit the use of an affidavit in a criminal court to an affidavit which is sworn before a magistrate or registrar, then s 424 (1)(a) may have to be redrafted thus:

> No affidavit shall be used in a criminal court unless it is sworn—
>
> (a) in the Federation before any magistrate or registrar.

However, this is not the case here nor are there words to that effect ever found in s 424.

Section 424(1)(a) of the CPC should be read together with O 41 of the RHC 1980, s 3 and s 11(1) of the CJA 1964 and r 12 of the 1993 rules and be given a liberal interpretation since there is no prohibition against or restriction excluding an affidavit sworn in the Federation before a Commissioner for Oaths. I am therefore unable to uphold the objection of the learned deputy. In the circumstances, I answer the question of law in the negative. Section 424(1)(a) does not prohibit or exclude the use of an affidavit in a criminal court if such an affidavit is sworn in the Federation before a Commissioner for Oaths. In the circumstances, I hold that the respective affidavits which were sworn in the Federation before a Commissioner for Oaths can be used in this criminal court for the purposes of the criminal proceedings herein.

Incidentally, in the course of writing this judgment, I note that Zulkefli JC (as he then was) in *Baharuddin bin Kamsin v Pihak Berkuasa Sidang Panglima Armada Pengkalan TLDM Lumut* [1996] 4 MLJ 184 dismissed the learned federal counsel's preliminary objection on the same ground as raised by the learned deputy in the case before me. His Lordship held, inter alia, that an affidavit affirmed before a duly appointed Commissioner for Oaths would be in order and in compliance with the requirement of s 424(1) of the CPC.

Preliminary objection dismissed.

Reported by Kenneth Goh